become embodied in the common law were law before they were adopted by the courts. In a recent article concerning the judicial enforcement of custom the notion that judges are incompetent to add to the law is condemned as a fiction. *Customary Law in Modern England*, by W. Jethro Brown, 5 Columbia L. Rev. 561 (Dec., 1905).

The writer's discussion deals with two questions: at what stage does custom become law, and from what source does it derive its binding force? Custom, the author maintains, amounts only to "a highly persuasive, rather than a legally binding, source of rules." A given custom does not become a rule of law until it has been adopted by judicial decision, and the courts are bound to enforce it. Support for these contentions is sought in "the fact that courts never enforce custom as such, but only enforce custom as satisfying certain tests which the courts themselves have imposed." Particular customs, in order to be enforced, must be reasonable, certain, and immemorial; and even general customs must be reasonable in order to receive the judicial sanction which makes them law. The writer draws a distinction between the conditions under which customs and precedents are given effect by the courts. A precedent binds "unless obviously unreasonable, whilst a custom must be proved positively to be reasonable and in accord with public convenience." The second question as to the source of the binding force of custom is answered by saying that judges are bound to adopt a custom which satisfies the required tests, "not by virtue of any inherent authority of custom, but by virtue of their own practice." The reason why a custom satisfying these tests is law, is simply because "the judges treat it as such," when they sanction it by a decision.

The writer's discussion raises fundamental questions as to the nature of law which divide the historical and analytical schools of jurisprudence. According to the doctrines of the former school, not only is custom law, before it receives any judicial sanction, but it possesses a binding force independently of enforcement by courts and by an inherent and ultimate authority of its own. The analytical jurists, while agreeing that custom derives its authority as law from the sanction of the courts, disagree as to the precise period when custom satisfies the requirements of the definition of law. According to Austin a custom is transmuted into law only when it is adopted as such by a court of justice and the decision is enforced by the power of the state. AUSTIN, JURISPRUDENCE, 4th ed., 104. Holland, however, lays it down that a custom becomes law as soon as it satisfies specified tests, though it has not yet been adopted in any judicial decision; a custom, when it fulfils these requirements, is law by virtue of a "tacit law of the state giving to such customs the effect of laws." HOLLAND, JURISPRUDENCE, 9th ed, 59. The language of Holland's statement seems to involve an argument in a circle. Mr. Brown's view that custom derives its authority from the practice of courts in enforcing it, seems to describe more accurately the facts of our judicial system. And his contention that custom in order to become law must first be sanctioned by judicial decision, is supported by the language of the modern English decisions. See *Brandao* v. *Barnett*, 12 Cl. & F. 787, 805; *Goodwin* v. *Roberts*, L. R. 10 Exch. 346, 352, 357. A similar opinion is expressed in several American decisions. See *Consequa* v. *Willings*, Pet. (U. S. C. C.) 225, 230; *Bonham* v. *Charlotte, etc., R. R. Co.*, 13 S. C. 267, 276.

DISSENTING OPINIONS. — For half a century there has been scattering discussion of the wisdom of dissenting opinions in courts of last resort. No one has attempted to assert that uniform agreement among judges is possible so long as judges are human; the question has been as to the propriety of the publication of their disagreements. The chief arguments against any expression of dissent are its powerlessness to affect the decision of the case, its detraction from the prestige of the impersonal court, and its effect in keeping the law unsettled. The first is probably disposed of by the consideration that the reasons of the court are stated not so much for the benefit of the litigants

as for the assistance of future judges in passing on identical or similar states of fact. The second is a real objection if true, but it is doubtful if the dignified statement of universally suspected differences of opinion does not rather inspire confidence in the independence of the judges. The third objection is put with great force in a recent article. *Dissenting Opinions*, by William A. Bowen, 17 Green Bag 690 (Dec., 1905).

The author's main thesis is that certainty is more important than justice in the law. To gain it he would have courts speak with but one unwavering voice, however divided in the council-chamber the judges may be. Undoubtedly the law would, in a sense, become more settled by such a course. But many advocates of dissenting opinions are willing to have the law temporarily unsettled by a cogent dissent, since they do not admit the total undesirability of such a condition. So long as courts are permitted to reverse their own decisions the law will never be definitely fixed. Moreover, as the law is not composed of unrelated rules, it will always be found that parts out of harmony with the whole will require alteration to avoid contradictions. For these reasons a writer on the other side prefers uncertainty in the law until it can be settled rightly. See *Dissenting Opinions*, by V. H. Roberts, 39 Am. L. Rev. 23. Mr. Roberts points out that dissenting opinions have often served as the basis for correction of unwise decisions, or, where such decisions have not been overruled, have limited their further extension. So too, another writer has paid high tribute to many of the dissenting opinions on constitutional questions of the Supreme Court Justices, while deprecating ordinary dissent. See *Great Dissenting Opinions*, by Hampton L. Carson, 50 Alb. L. J. 120. Mr. Carson outlines the sensible influence of these opinions upon the development of constitutional construction. As against this, the writer of the present article maintains the extreme position that the injuriousness of a dissenting opinion is in direct proportion to its strength and to the importance of the case. The chief fallacy of the article lies in the author's failure to distinguish between the results of unavoidable differences of opinion and the results of the expression of such differences.

Most of us, however, will agree with the writer's strictures on the abuses of the privilege. A large part of the criticism to which it has been subjected is not due to a fundamental weakness, but to the tendency of minority judges to travel out of the law into a discussion of moral, social, and political questions which they think the decision of the court will precipitate. Of course, dissent which is hair-splitting or on questions of fact is always objectionable. If judges would dissent only when they believed their brethren to be seriously mistaken, and would confine themselves to a dignified exposition of the exact point of difference on the law, the abolitionist camp would lose much of its ammunition.

LIFE SALVAGE. — While strongly commending the general consistency of the law of salvage, Mr. Frederic Cunningham, in a recent article, finds in it one strange anomaly, in regard to the law of life salvage. *Life Salvage*, 17 Green Bag 708 (Dec., 1905). If the passengers of a ship are rescued without saving the ship itself, no compensation can be recovered either from the passengers or from the owner of the vessel. *The George W. Clyde*, 80 Fed. Rep. 157. On the other hand, if passengers and ship are both saved, the owner of the vessel must pay a greater amount of salvage than the mere rescue of the ship would entail. *The Bremen*, 111 Fed. Rep. 228.

Mr. Cunningham fully appreciates the desirability of giving even greater encouragement to the rescue of life at sea than is offered for the saving of property, but protests with manifest reason against compelling the ship-owner to furnish that encouragement when he derives no substantial benefit in return. Such an objection, of course, could not be urged where the saving of life frees the ship-owner from liabilities in damages which would otherwise be incurred. As a solution of the difficulty, the writer suggests the passage of a United States statute, allowing the salvor to recover against the person whose life he